Supreme Court, U.S.
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No. _____
In the Supreme Court of the United States
October Term, 1996

STATE OF MICHIGAN,

Petitioner,

v.

VAL RICCARDO FERNENGEL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

FRANK J. KELLEY
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Jonathon C. Pierce
Assistant Attorney General
Attorneys for Petitioner

QUESTION PRESENTED

WHERE THE POLICE HAVE ALLOWED A VEHICLE'S OCCUPANT, KNOWN TO BE DANGEROUS, TO WALK A SHORT DISTANCE AWAY FROM AN AUTOMOBILE BEFORE ARRESTING HIM ON A VALID FELONY WARRANT, DOES THE RULE IN *NEW YORK v. BELTON*, 453 U.S. 454; 101 S. Ct. 2860; 69 L. Ed. 2d 768 (1981), ALLOW POLICE TO SEARCH THE PASSENGER COMPARTMENT OF THE AUTOMOBILE INCIDENT TO THAT LAWFUL ARREST?

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OPINIONS BELOW

The unpublished Michigan Supreme Court's order denying Petitioner's Motion for Reconsideration is reprinted in the Appendix. App. to Pet. 1a.

The unpublished Michigan Supreme Court's order denying Petitioner's Application for Leave to Appeal is reprinted in the Appendix. App. to Pet. 2a.

The Court of Appeals published decision that reversed the trial court's decision is reprinted in the Appendix. App. to Pet. 3a.

The trial court's unpublished findings and decision denying the Respondent's motion to suppress are reprinted in the Appendix. App. to Pet. 11a.

The district court's preliminary examination transcript excerpt containing information pertinent to this Petition is reprinted in the Appendix. App. to Pet. 29a.

JURISDICTION

The Michigan Court of Appeals in *People v. Fernengel*, 216 Mich. App. 420; 549 N.W.2d 631 (1996), entered its order reversing the trial court's denial of Respondent's motion to suppress on April 26, 1996. The Michigan Supreme Court denied leave to appeal on July 23, 1996, and denied a motion for reconsideration on September 27, 1996. This petition is filed within 90 days of the date of the most recent order.

This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION

The United States Constitution, U.S. Const., amend. IV, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

This case presents a Fourth Amendment challenge to the search of the passenger compartment of a motor vehicle conducted as an incident to the arrest of Respondent Fernengel on a valid warrant. The search occurred after police arrested Respondent when he was making a food delivery to the public safety building in which the police maintained its office. Police discovered a loaded handgun, which led to Respondent's convictions of carrying a concealed weapon, Mich. Comp. Laws § 750.227; Mich. Stat. Ann. § 28.424 and possession of a firearm by a felon, Mich. Comp. Laws § 750.224f; Mich. Stat. Ann. § 28.421(6). He also pleaded guilty of being an habitual offender, Mich. Comp. Laws § 769.12; Mich. Stat. Ann. § 28.1084. He was sentenced to two terms of ten to fifteen years imprisonment.

Respondent Val Fernengel first came under investigation in this matter on February 21, 1994, as a result of a complaint received by the Barry Township Public Safety Department in Delton, Michigan, from parents who were concerned about inappropriate remarks he had made to their daughter during a job interview at his newly-opened restaurant. Motion to Suppress Hearing Transcript ("MT") at 8; App. 16a.

Police Chief Mark Kik conducted a LEIN check on Fernengel and discovered an outstanding felony warrant in Crawford County, Illinois. Preliminary Examination

Transcript ("PT") at 5; App. 32a; Trial Transcript ("TT") at 81. With the warrant came an extensive criminal history report that included numerous arrests or convictions for kidnapping, larceny, aggravated rape, and weapons-related charges. MT 6; App. 14a-16a. Rather than confront the Respondent at his restaurant, Kik and other police officers placed a food order for Fernengel to deliver at the public safety building, where the arrest on the warrant could be made with the least possible risk to the police and the public. MT 16; App. 23a; PT 7; App. 34a; TT 82.

When Fernengel arrived at the public safety building with the food order, he parked the van in the parking lot directly by the building doors, got out of the van, left the driver's door open, and began walking from the van to the building. MT 12; App. 19a-20a PT 8; TT 85. The police arrested him within a short distance of the van. Officer Kik testified at the preliminary examination concerning Fernengel's arrest, PT 8-9; App. 35a-36a:

> . . . As he cleared the van he was challenged by the officers to stop and raise his hands and that he would be placed under arrest.
>
> Q And that was in close proximity to the van?
>
> A That's -- Yes, sir, it was. As soon as he cleared the doorway to get out of the --
>
> Q A matter of feet?
>
> A Yes, sir. Probably 10, 12 feet from the van.

At the hearing on the motion to suppress, Officer Kik gave the following testimony, MT 12; App. 20a:

> A Yes, sir. We let him exit the vehicle and walk away from the vehicle so -- in our opinion so he wouldn't have a chance to get back into the vehicle. He prob'ly walked prob'ly 20, 25 feet at the most, and then he was approached by officer Olejniczak and

> Officer Fawcett from my department and told he was placed under arrest.

While two police officers arrested Respondent and placed him inside the public safety building, two other officers performed "a wingspan search of the front seat of the vehicle." PT 9; App. 36a. The arrest was pursuant to the outstanding Illinois felony warrant and the search of the vehicle without a warrant was incident to the arrest and was done: "Immediately. In fact, while they started handcuffin' him, we secured the vehicle, yes, sir." MT 14; App. 21a. They looked down in the driver's door inside pocket, saw a metallic object that had not been in plain view, and removed a loaded .25 caliber pistol. TT 85. Subsequent tests proved that the weapon was operable. TT 87.

The Barry County Prosecuting Attorney charged Fernengel with felon in possession of a firearm and carrying a concealed weapon. Fernengel filed a pretrial motion to suppress the pistol as evidence, claiming that the warrantless vehicle search violated his right against unreasonable searches and seizures. The Barry County Circuit Court denied the motion and upheld the search. MT 22; App. 26a-27a.

In 1994, a Barry County jury found him guilty of both charges, and he pleaded guilty to being an habitual offender. The Barry County Circuit Court on October 6, 1994 sentenced him to two concurrent 10-to-15-year prison terms.

On appeal to the Michigan Court of Appeals, he again contested the search's constitutionality. In *People v. Fernengel*, 216 Mich. App. 420; 549 N.W.2d 631 (1996), App. 3a, a majority of the Court cited *United States v. Strahan*, 984 F.2d 155 (6th Cir. 1993), and held that, because Fernengel was no longer a vehicle occupant at the point of arrest, the automobile-search-incident-to-arrest rule stated in *New York v. Belton*, 453 U.S. 454; 101 S. Ct. 2860; 69 L. Ed. 2d 768 (1981), was inapplicable. The Court also looked to the more general search-incident-to-arrest test in *Chimel v. California*, 395 U.S. 752; 89 S. Ct. 2034; 23 L. Ed. 2d 685 (1969), *reh den*. 396 U.S. 869 (1969), and said that because Respondent Fernengel was too far from the van when

arrested to lunge or obtain a weapon that would endanger the police officers and because the passenger compartment of the vehicle was not within Fernengel's "immediate control" the search was not incident to the arrest. App. 6a. The Court reversed the trial court's denial of the motion to suppress and reversed the convictions.

Dissenting, Judge Peter O'Connell wrote that if police can, under *Belton*, arrest a vehicle occupant and place him or her in a police vehicle before conducting a warrantless search incident to the arrest, the facts in this case provided even greater support for a warrantless search. *Fernengel* at 428; App. 9a.

The People applied for leave to appeal to the Michigan Supreme Court. The Court, with three Justices dissenting, denied the People's application on July 23, 1996. The People's motion for reconsideration was likewise denied, with the same three Justices dissenting, on September 27, 1996.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THAT WHEN POLICE MAKE A VALID ARREST OF A RECENT OCCUPANT OF A VEHICLE, THEY CAN ALSO MAKE A VALID SEARCH OF THE PASSENGER COMPARTMENT OF THE VEHICLE INCIDENT TO THAT ARREST EVEN WHEN THE OCCUPANT VOLUNTARILY LEFT THE VEHICLE AND MOVED A SHORT DISTANCE AWAY BEFORE THE ARREST.

A. The Michigan Court of Appeals Violated The Principle Of *New York v. Belton* Through An Impermissibly Stringent Definition Of A Search Incident To An Arrest.

The Court of Appeals decision in this matter does not merely misapply *Belton* to a particular set of facts; it runs directly counter to the principle of *Belton*, which upheld the search of a vehicle incident to an arrest where the

defendants had recently occupied the vehicle before their arrest and where they were under the control of a police officer away from the vehicle. The Michigan Court of Appeals incorrectly held, as a matter of federal constitutional law, that the search was invalid solely because "The confrontation with the police in this case did not occur until defendant had voluntarily left the van and was twenty to twenty-five feet away from it. Therefore, the search was outside of the scope of both *Belton* and *Chimel*" App. 6a.

Because the Michigan courts did not rely on the Michigan Constitution in reaching their decisions, the United States Constitution exclusively governs analysis of whether the defendant's handgun should have been suppressed. *Michigan v. Long*, 463 U.S. 1032, 1044; 103 S. Ct. 3469; 77 L. Ed. 2d 1201 (1983).

The United States Constitution guarantees the right to be secure against unreasonable searches and seizures. U.S. Const., Amend IV. A search is usually unreasonable unless it is conducted under a warrant, *Griffin v. Wisconsin*, 483 U.S. 868, 873; 107 S. Ct. 3164; 97 L. Ed. 2d 709 (1987), but there are exceptions to the warrant requirement:

> This Court has recognized, however, that "the exigencies of the situation" may sometimes make exemption from the warrant requirement "imperative." *McDonald v. United States*, 335 U.S. 451, 456. Specifically, the Court held in *Chimel v. California*, 395 U.S. 752, that a lawful custodial arrest creates a situation which justifies the contemporaneous search without a warrant of the person arrested and of the immediately surrounding area. Such searches have long been considered valid because of the need "to remove any weapons that [the arrestee] might seek to use in order to resist arrest or effect his escape" and the need to prevent the concealment or destruction of evidence. *Id.*, at 763.

New York v. Belton, 453 U.S. at 457.

In *Belton*, a New York State Trooper stopped a speeding vehicle, observed evidence in plain view and detected the odor of marijuana, directed the four occupants to get out of the car, placed them under arrest, separated them on the side of the road and searched the passenger compartment of the vehicle and the zippered pocket of a jacket found in the car. The question in the case was whether the constitutionally permissible scope of a search incident to a valid custodial arrest included the passenger compartment of the automobile in which the arrestee had recently been riding.

This Court first cited *Chimel* for the proposition that there is ample justification for a search of the immediate area from within which an arrestee might gain possession of a weapon or destructible evidence, but then observed that, "Although the principle that limits a search incident to a lawful custodial arrest may be stated clearly enough, courts have discovered the principle difficult to apply in specific cases." 453 U.S. at 458. The Court then gave examples of the conflicting decisions observed "by a look at even a small sample drawn from the narrow class of cases in which courts have decided whether, in the course of a search incident to the lawful custodial arrest of the occupants of an automobile, *police may search inside the automobile after the arrestees are no longer in it.*" 453 U.S. at 459, emphasis added.

The Court correctly said, 453 U.S. at 459, that a "straightforward rule, easily applied, and predictably enforced" was needed in this area in order that a person can "know the scope of his constitutional protection" and that a policeman can "know the scope of his authority." 453 U.S. at 460. The Court then announced a "bright-line" rule, 453 U.S. at 460:

> While the *Chimel* case established that a search incident to an arrest may not stray beyond the area within the immediate control of the arrestee, courts have found no workable definition of "the area within the immediate control of the arrestee" when that area arguably includes the interior of an

> automobile and *the arrestee is its recent occupant*. Our reading of the cases suggests the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within "the area into which an arrestee might reach in order to grab a weapon or evidentiary [item]." *Chimel*, 395 U.S., at 763. In order to establish the workable rule this category of cases requires, we read *Chimel*'s definition of the limits of the area that may be searched in light of that generalization. Accordingly, we hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.

(Emphasis added, footnotes omitted.)

By applying this rule even when an article is not "inevitably within 'the area into which an arrestee might reach,'" the Court recognized that the need for a workable straightforward rule outweighed the benefits of having to "litigate[] in each case the issue of whether or not there was present one of the reasons supporting the authority for a search. . . ." 453 U.S. at 459, quoting *United States v. Robinson*, 414 U.S. 218, 235; 94 S. Ct. 467; 38 L. Ed. 2d 427 (1973). The Court also emphasized that although the need to protect the police officer and the need to discover evidence form the basis for the search incident to the arrest, the authority to search "does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found . . . " 453 U.S. at 461, quoting *United States v. Robinson*, 414 U.S. at 235. Finally, the Court rejected the argument that a search could not be valid as incident to the arrest because the item searched was within the "exclusive control" of the police officer: "But under this fallacious theory no search or seizure incident to a lawful custodial arrest would ever be valid; by seizing an article even on the arrestee's person, an officer may be said to have reduced that article to his

"exclusive control." 453 U.S. at 461, n. 5.

In *United States v. Doward*, 41 F. 3d 789, 793 (1st Cir. 1994), the Court explained how *Belton* departed from *Chimel's* general limits on searches conducted incident to an arrest:

> [T]he *Belton* majority opted to relax *Chimel's residence*-related arrest rationale in automobile-related arrests lest its fact-intensive inquiries immerse the courts in second-guessing decisions made by law enforcement officers in rapidly evolving circumstances fraught with unpredictable risks to life and limb (emphasis in original).

Thus the rationale of *Belton* is grounded on the recognition of a police officer's need to protect his or her safety, the need to discover and preserve evidence, and the need for a workable straightforward rule by which people can know the scope of their constitutional protection and the police can know the scope of their authority. The facts and rationale of *Belton* demonstrate that a search of the passenger compartment of an automobile incident to an arrest of a recent occupant of the vehicle is constitutional even if the arrestee has left the vehicle, is in the control of the police officer and may not have immediate direct access to the vehicle he recently occupied. The Michigan Court of Appeals failed to recognize these principles and consequently has adopted an incorrect constitutional interpretation.

Since *Belton*, this Court has generally understood that ensuring police officer safety in the course of a search is paramount. "Every arrest must be presumed to present a risk of danger to the arresting officer. . . . There is no way for an officer to predict reliably how a particular subject will react to arrest or the degree of the potential danger (citation omitted)." *Washington v. Chrisman*, 455 U.S. 1, 7; 102 S. Ct. 812; 70 L. Ed. 2d 778 (1982). "The officer's need to ensure his own safety -- as well as the integrity of the arrest -- is compelling (footnote omitted)." *Id.*

Michigan v. Long, supra, 463 U.S. at 1051, involved an investigative stop rather than a full custodial arrest as in the instant case, but the dangers this Court recognized apply in both circumstances:

> The Michigan Supreme Court appeared to believe that it was not reasonable for the officers to fear that Long could injure them, because he was effectively under their control during the investigative stop and could not get access to any weapons that might have been located in the automobile. See 413 Mich, at 472, 320 NW2d, at 869. This reasoning is mistaken in several respects. During any investigative detention, the suspect is "in the control" of the officers in the sense that he "may be briefly detained against his will ... ." Terry, supra, at 34, 20 L Ed 2d 889, 88 S Ct 1868, 44 Ohio Ops 2d 383 (White, J., concurring). Just as a Terry suspect on the street may, despite being under the brief control of a police officer, reach into his clothing and retrieve a weapon, so might a Terry suspect in Long's position break away from police control and retrieve a weapon from his automobile.

In referring to its decision in *Belton*, the *Long* Court at 1049 reiterated the precept that "articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon' . . . ." "What we borrow now from *Chimel v. California*, 395 U.S. 752 (1969), and *Belton* is merely the recognition that part of the reason to allow area searches incident to an arrest is that the arrestee, who may not himself be armed, may be able to gain access to weapons to injure officers or others nearby, or otherwise to hinder legitimate police activity." *Long*, at 1049, n. 14.

Other courts have realized that, despite precautionary measures such as handcuffing, arrestees may still attempt to resist and regain access to weapons or evidence. In *United*

States v. Abdul-Saboor, 85 F. 3d 664, 670-671 (D.C. Cir. 1996), the court understood that even though the arrestee was handcuffed, the area that had been within Abdul-Saboor's "immediate control" was also "conceivably accessible". In *United States v. Holifield*, 956 F. 2d 665, 669 (7th Cir. 1992), the Seventh Circuit quoted *Michigan v. Long* and wrote that a suspect "under the brief control of a police officer . . . might . . . break away from police control and retrieve a weapon from his automobile." Even a handcuffed suspect remains dangerous, as handcuffs "limit but do not eliminate a person's ability to perform various acts." *United States v. Sanders*, 994 F. 2d 200, 209-210 (5th Cir. 1993).

"As recognized in both *Belton* and *Chimel*, searches incident to an arrest frequently occur after a defendant has been removed to the back seat of a patrol car and handcuffed." *People v. Fernengel*, at 427-428; App. 9a, O'Connell, J., dissenting. Yet, the Court of Appeals held that the search was not reasonable. Under the Court of Appeals' mistaken view of the Constitution, the Barry Township police could only have searched the vehicle incident to the arrest if they had arrested him *before* he left the van or when he returned to the van *after* delivering the food order. Such an illogical result heavily penalizes police officers for using lawful, prudent arrest procedures available to them under *Belton*.

Despite the police officers' efforts to minimize danger and isolate him from his van where a weapon could have been--and actually was--hidden, Respondent Fernengel could have tried to break away and return to the van, either to draw his weapon or to escape. Letting him leave the vehicle before arresting him did not completely eliminate this possibility. Under the circumstances of the instant case, the officers' conduct was eminently reasonable given the Respondent's assaultive crime history. Arresting Fernengel and placing him in the police station was no different than if the police had arrested him and put him in a police vehicle's rear seat while searching the van during the course of a lawful traffic stop. Although Fernengel had stepped out of the vehicle to deliver the food, he would have returned immediately to the vehicle.

The search in the instant case is in harmony with *Belton's* bright-line rule, and minimizes the danger to police officers inherent in any arrest situation where a vehicle recently under the arrestee's control is in the vicinity and could be used as a means of escape or attack or as a place of concealment for weapons. Allowing the Michigan Court of Appeals decision to stand will force Michigan's law enforcement officials to take unreasonable risks when apprehending felons known for violent conduct or crimes involving weapons.

B. The Federal Courts Of Appeal Are Divided On Whether Police Must Confront An Individual In His Or Her Vehicle Before Conducting A Valid Arrest And A Search Incident To That Arrest.

Despite this Court's effort in *Belton* to establish a "workable" and "straightforward rule, easily applied, and predictably enforced," conflicts remain in decisions around the country on the question of the constitutionality of a search of an automobile incident to the arrest of a recent occupant of the vehicle. In *Belton* itself, the search was made only after the arrestees had left the vehicle and were under the officer's control away from the vehicle. Other courts have reached similar results and held that police can remove and detain an arrestee away from a vehicle and still satisfy *Belton*. A suspect can be secured in a police car while police search the vehicle. *United States v. Willis*, 37 F. 3d 313, 317 (7th Cir. 1994). The *Belton* exception to the Fourth Amendment does not turn upon a defendant's actual ability to grab an item in a vehicle's passenger compartment. *United States v. Moorehead*, 57 F. 3d 875, 878 (9th Cir. 1995). Law enforcement officers do not have to abandon a search incident to an arrest if the arrestee is removed from the scene. *Doward, supra*, 41 F. 3d at 793. A search may be valid even if police secure the arrestee with handcuffs, place him or her on the ground, with the vehicle's door closed. *United States v. Lacey*, 86 F. 3d 956, 971 (10th Cir. 1996).

The United States Court of Appeals for the Sixth Circuit has upheld a passenger compartment search when an officer initiated contact with the defendant, regardless of

whether the defendant was arrested while actually occupying the auto or after having recently been removed from the auto. *See United States v. Thomas*, 11 F. 3d 620, 628 (6th Cir. 1993), *cert den.*, 114 S. Ct. 1570, 1571; 128 L. Ed. 2d 214 (1994); *United States v. Patterson*, 993 F. 2d 121, 122-123 (6th Cir. 1993). That same Circuit, however, has also held that a defendant who voluntarily exits a vehicle and has begun walking away before an officer initiates contact does not fit within *Belton's* bright-line rule. Instead, a case-by-case reasonableness analysis under *Chimel* is applied. *United States v. Hudgins*, 53 F. 3d 115, 119 (6th Cir. 1995); *Strahan, supra*, 984 F. 2d at 159. Also, the District of Columbia Circuit in *United States v. Fafowora*, 865 F. 2d 360, 362 (D.C. Cir. 1989), threw out a search conducted after the defendants had parked their vehicle and walked away.

By contrast, other federal appellate courts have disagreed with the Sixth Circuit's analysis of the validity of searches incident to the arrest of persons recently occupying vehicles. For example, the Circuit Court of Appeals for the Seventh Circuit in *United States v. Snook*, 88 F. 3d 605, 608 (7th Cir. 1996), upheld a search of a vehicle that the owner had left immediately before the arresting officer arrived to effect an arrest warrant. The *Snook* Court noticed that that case's facts were similar to *Belton's* and wrote "[t]he fact that Snook had just stepped out of his vehicle as the officer arrived and before his arrest does not alter his status as an 'occupant'. . . ."

The Seventh Circuit has also applied a "positive link" analysis to determine whether an arrestee was a vehicle occupant. In *United States v. Adams*, 26 F. 3d 702, 705 (7th Cir. 1994), the Court held that the defendant "was neither an occupant of the searched vehicle nor positively linked to it prior to his arrest" and was thus not an occupant. Adams when arrested was at the rear of his locked vehicle; he had accidentally deactivated the vehicle's alarm that attracted police officers to the vehicle and had not been observed in the vehicle.

Still another Seventh Circuit panel in *United States v. Willis*, 37 F. 3d 313, 317 (7th Cir. 1994), held that an arrestee who police had seen in a vehicle and was later

arrested after he left the vehicle was an occupant under *Belton*. "We do not believe the requirement that a search incident to arrest be 'contemporaneous' with the arrest means that an officer is forbidden to undertake any intervening act at all between arrest and search." *Id.* at 318.

The District of Columbia Circuit apparently rejected its reasoning in *Fafowora* when it explained in *United States v. Abdul-Saboor*, 85 F. 3d 664, 668 (D.C. Cir. 1996), that "[t]he relevant distinction turns not upon the moment of the arrest versus the moment of the search but upon whether the arrest and search are so separated in time or by intervening events that the latter cannot fairly be said to have been incident to former."

Furthermore, the Tenth Circuit in *United States v. Franco*, 981 F. 2d 470, 472-473 (10th Cir. 1992), upheld the search of Franco's vehicle that was parked near an undercover agent's vehicle in which the two had negotiated a drug deal. Although Franco had moved between the two vehicles during the transaction, the *Franco* Court at 473 held that the defendant was a recent occupant of the vehicle and the arrest was made in close proximity to Franco's car.

Belton, of course, does not provide unlimited license to search vehicles. *Belton* itself distinguished two cases in which the searches were invalid because they were too far removed in time or distance from the arrest. 453 U.S. at 461-462. Similarly, in *United States v. LaSanta*, 978 F. 2d 1300, 1305 (1st Cir. 1992), the Court excoriated the government when it argued that it could seize and search a vehicle in the driveway for drugs when the arrestee-owner was asleep in his house. The Ninth Circuit in *United States v. Vasey*, 834 F. 2d 782, 787 (9th Cir. 1987), observed that the arrestee had been handcuffed and detained in a police vehicle thirty to forty-five minutes before police searched the vehicle and found the search invalid. And, in *United States v. Lugo*, 978 F. 2d 631, 635 (10th Cir. 1992), a search was found invalid where the arrestee had been arrested and was being transported toward a distant location when the search occurred.

The facts in the instant case can be easily distinguished, as the search occurred simultaneously with Fernengel's arrest and detention. Moreover, the Sixth Circuit in *Hudgins* and *Strahan* by requiring police to confront an arrestee while he or she remains within a vehicle unduly hobbles this Court's reasoning in *Belton*. Other Circuits have used more practical analyses consistent with *Belton*, such as positively linking the defendant to the vehicle in *Adams*, or whether the defendant was a recent occupant in control of his vehicle in *Franco*, to determine the validity of the search.

To find that the instant case does not fall within the bright-line principle announced in *Belton* ignores both *Belton's* rationale as well as reality. The arresting officers saw him arrive in his van, alight and leave the door open in anticipation of returning to the vehicle once the food order was delivered. If *Belton* is read to preclude a search in the situation where police contact a suspect just after the suspect leaves his or her vehicle, then knowledgeable suspects could effectively conceal a weapon or evidence simply by stepping out of the vehicle whenever they saw a police officer approaching. Police officers should not have to race up to an arrestee's vehicle to prevent the arrestee from leaving his or her vehicle.

Yet, the Michigan Court of Appeals' reasoning in the instant case would mandate such a race, which in many cases would bring police face-to-face with armed individuals. Even the *Strahan* Court at 158 was concerned with the "alarming rate of attacks on law enforcement officers."

The Seventh Circuit in *United States v. Karlin*, 852 F. 2d 968, 971 (7th Cir. 1988), warned against imposing "on police a requirement that the search be absolutely contemporaneous with the arrest, no matter what the peril to themselves or to bystanders." And, *United States v. Mitchell*, 82 F. 3d 146, 152 (7th Cir. 1996), looked to *Karlin* and upheld a vehicle search following an arrest of the vehicle's passenger after she had been ordered from the vehicle and wrote:

> *Belton* firmly establishes that the officers had the authority to search the immediate vicinity of her arrest for weapons or evidence and that the area of that search includes the interior of the vehicle in which she was found immediately before the arrest . . . it does not make sense to prescribe a constitutional test that is entirely at odds with safe and sensible police procedures.

The Seventh Circuit, as well as other Circuits, have analyzed auto-search-incident-to-arrest challenges by examining whether the arrestee can be temporally and spatially linked to the vehicle, not whether the arrestee was actually occupying the vehicle when approached by police. By evaluating a vehicle search incident to arrest by whether the arrestee was physically in a vehicle before police take him or her out of it, the Michigan Court of Appeals has placed unreasonable restrictions on police, and ignores *Belton's* "search contemporaneous incident to arrest" rule.

CONCLUSION

Letting a vehicle occupant move a short distance from a vehicle before making an arrest is no different than taking the occupant out and placing him or her securely in a police vehicle before searching it. Police saw Fernengel drive up and leave the vehicle with the door open. Walking away from the van to conduct the food delivery did not disrupt his connection to it, as he intended to immediately return to the van and drive away. As the trial court held, this tactic was simply good, prudent police work, not manipulation. Police arrested Respondent Fernengel under a valid warrant, searched his vehicle incident to the arrest and found a loaded handgun. The arresting officers, aware of his long criminal record which included multiple violent crime charges and convictions, allowed him to move a short distance away from the vehicle before arresting him. Under the Michigan Court of Appeals' rationale, if the Barry Township police acted a few seconds earlier or later, the search would have been valid, although the only difference would have been a vast increase in the danger to the police officers since during

those seconds Fernengel would have had immediate access to the loaded handgun.

If the Court of Appeals decision is allowed to stand, criminal defendants will argue that a defendant can immunize his or her motor vehicle from a search incident to a lawful arrest by simply leaving the vehicle before police could commence an arrest. In the extreme case, defendants may even attempt to invert *Belton* by claiming that once police have removed them from a motor vehicle, arrested them, and placed them in a police vehicle, *any* warrantless search would be constitutionally improper.

This case presents an issue that will reoccur in a significant number of future cases involving automobile searches incident to arrest and will profoundly cripple law enforcement's legitimate efforts to safely deter and detect criminals who illegally carry weapons or other contraband in motor vehicles. As Judge O'Connell wrote in his dissent in this case, if "lawful searches occur far more removed in time and space than the search conducted in the present case, and in situations where there is virtually no possibility that the defendant will be able to obtain a hidden weapon," then "surely the search conducted in the present case is eminently *more* reasonable" (emphasis in original).

RELIEF REQUESTED

The search incident to the arrest in the instant case was fully within the letter and spirit of *Belton* and Petitioner State of Michigan respectfully urges this Court to grant certiorari and reverse the Michigan Court of Appeals' incorrect constitutional interpretation.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, MI 48909
(517) 373-1124

Dale A. Crowley
Barry County
Prosecuting Attorney

Jonathan C. Pierce
Assistant Attorney General

Attorneys for Petitioner

December 20, 1996

APPENDIX

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Order
Entered: September 27, 1996

Michigan Supreme Court
Lansing, Michigan

106321(45)

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

VAL RICCARDO FERNENGEL,

Defendant-Appellee.

SC: 106321
COA: 180586
LC: 94-53-FH

On order of the Court, the motion for reconsideration of this Court's order of July 23, 1996, is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

Boyle, Riley and Weaver, JJ., would grant reconsideration, and on reconsideration, would grant leave to appeal.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

SEAL

September 27, 1996 /s/ Jacqueline B. MacKinnon
Deputy Clerk

Order
Entered: July 23, 1996

Michigan Supreme Court
Lansing, Michigan

106321

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

VAL RICCARDO FERNENGEL,

Defendant-Appellee.

SC: 106321
COA: 180586
LC: 94-53-FH

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question presented should reviewed by this Court.

Boyle, Riley, and Weaver, JJ., would grant leave to appeal.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

SEAL

July 23, 1996

/s/ Corbin R. Davis
Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VAL RICCARDO FERNENGEL,

Defendant-Appellant.

FOR PUBLICATION
April 26, 1996
9:25 a.m.

No. 180586
LC No. 94 00053 FH

Before: Wahls, P.J., and Reilly and O'Connell, JJ.

REILLY, J.

Defendant was convicted by a jury of carrying a concealed weapon, MCL 750.227; MSA 28.424, and possession of a firearm by a felon, MCL 750.224f; MSA 28.421(6) and later pleaded guilty of being an habitual offender fourth offense, MCL 769.12; MSA 28.1084. He was sentenced to two concurrent prison terms of ten to fifteen years and appeals as of right. We conclude that defendant's motion to suppress should have been granted because the search incident to an arrest exception to the warrant requirement was not applicable under these circumstances.

Defendant was the owner of a restaurant. While investigating defendant on a complaint unrelated to the present case, the police learned that there was an outstanding felony warrant for defendant from Illinois on a deceptive practice complaint. The warrant was confirmed at approximately 4:30 p.m.

In order to effectuate the arrest, the police officers called defendant's business and requested delivery of some

food to the public safety building, which was two blocks away from defendant's business. Defendant drove to the building in his van, got out, and began walking away carrying the food. When he was approximately twenty to twenty-five feet away from the van, he was approached by two officers and was placed under arrest. While he was being handcuffed, other officers searched his van and discovered a pistol that is the basis for defendant's convictions in this case.

Defendant contends that the search of his van without a warrant was unconstitutional. The prosecution contends that the officers were permitted to search the van incident to defendant's arrest.

The issue in this case concerns the scope of the search incident to arrest exception to the warrant requirement. In *New York v Belton*, 453 US 454; 101 S Ct 2860; 69 L Ed 2d 768 (1981), the Supreme Court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." The difficulty in this case is that defendant was not arrested while he was an occupant of the vehicle. Our review of the cases of the courts of this state applying *Belton* has not revealed a case addressing whether the officers may search the passenger compartment of a vehicle when the defendant voluntarily left the vehicle before the police initiated contact. However, in determining the scope of *Belton*, we have found guidance in the decisions of the Sixth Circuit.

The Sixth Circuit discussed its previous holdings concerning the scope of *Belton* in *United States v Hudgins*, 52 F 3d 115 (CA 6, 1995):

> The search of an automobile is generally reasonable even if the defendant has already been removed from the automobile to be searched and is under the control of the officer.
>
> Where the officer initiates contact with the defendant, either by actually confronting

> the defendant or by signaling confrontation with the defendant, while the defendant is still in the automobile, and the officer subsequently arrests the defendant (regardless of whether the defendant has been removed from or has exited the automobile), a subsequent search of the automobile's passenger compartment falls within the scope of *Belton* and will be upheld as reasonable. Our decisions have consistently upheld the search of the passenger compartment of an automobile when the officer initiated contact with the defendant while the defendant was still within the automobile later searched, regardless of whether the defendant was arrested while actually occupying the automobile or after having recently been removed from the automobile. However, where the defendant has voluntarily exited the automobile and begun walking away from the automobile before the officer has initiated contact with him, the case does not fall within *Belton's* bright-line rule, and a case-by case analysis of the reasonableness of the search under *Chimel* becomes necessary. [Citations omitted.]

In its discussion, the Sixth Circuit cited its decision in *United States v Strahan*, 984 F 2d 155 (CA 6, 1993), a case presenting facts similar to the present case. In *Strahan*, the police were given information that the defendant was going to a lounge every day at 10 a.m. to sell cocaine. They observed defendant drive his car to the lounge, park and hurriedly leave his car. One of the officers got out of his car and arrested defendant approximately thirty feet from the defendant's car. The officer patted the defendant down and then searched the car.

The Sixth Circuit agreed with the defendant that the search of the vehicle was improper. The court held that *Belton* did not apply because the defendant was approximately thirty feet from his vehicle when he was confronted and arrested by the officers. *Id.* at 159. Applying the immediate control test of *Chimel v California*, 395 US 752; 89

S Ct 2034; 23 LEd 2d 685 (1969), the court held that "[b]ecause the passenger compartment of the vehicle was not within Strahan's 'immediate control' at the time of the arrest, the search was not incident to a lawful arrest, and suppression is proper." *Strahan*, at 159.

We find the reasoning of the Sixth Circuit persuasive and adopt it as our own. The confrontation with the police in this case did not occur until defendant had voluntarily left the van and was twenty to twenty-five feet away from it. Therefore, the search was outside of the scope of both *Belton* and *Chimel*.

The prosecution argues that the police sought to minimize the danger that defendant, known for assaultive criminal conduct and weapons charges, would "cause trouble" by letting him move away from his van. In denying defendant's motion to suppress, the court referred to the "prudent police work." Our decision is not intended to discourage prudence. However, prudence in the manner in which defendant was arrested did not require a search of the van without a warrant. If the officers believed they had probable cause to search the van, they should have obtained a warrant before placing their food order. If they did not have probable cause, they should not be allowed to circumvent the warrant requirement by manipulating defendant into using the vehicle just before his arrest.

Belton was intended to establish "'a single, familiar standard . . . to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.'" *Belton*, at 458, quoting *Dunaway v New York*, 442 US 200, 213-214; 99 S Ct 2248; 60 L Ed 2d 824 (1979). If the rule is stretched to encompass the search of a vehicle that was voluntarily vacated by a person before confrontation with the police began, the "bright-line" rule becomes hazy and uncertain. The police officers would be left to wonder what combination of temporal and spatial proximity the arrestee must have to the vehicle at the time contact was initiated to allow the search without a warrant. Although *Belton* is subject to criticism[1], the approach of the Sixth Circuit provides a more definite standard to guide

police officers in their conduct.

The prosecution does not contend that the search can be justified by reference to other exceptions to the warrant requirement. Therefore, the trial court's denial of defendant's motion to suppress is reversed.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Myron H. Wahls
/s/ Maureen Pulte Reilly

[1]See 3 LaFave, Search and Seizure (2nd ed), §7.1, pp 2-20.

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee, FOR PUBLICATION

v

VAL RICCARDO FERNENGEL, No. 180586
LC No. 94 00053 FH

Defendant-Appellant.

Before: Wahls, P.J., and Reilly and O'Connell, JJ.

O'CONNELL, J. (dissenting).

I respectfully dissent. The majority concludes that the bright line rule established by the United States Supreme Court in *New York v Belton*, 453 US 454; 101 S Ct 2860; 69 L Ed 2d 768 (1981), does not apply to the case *sub judice*, and falls back on the older, more nebulous "immediate control" standard set forth in *Chimel v California*, 395 US 752; 89 S Ct 2034; 23 L Ed 2d 685 (1969). However, even assuming that the *Chimel* standard is the appropriate one in the present case, there exist scores of decisions suggesting that the instant dispute is not as "cut-and-dried" as the majority would have one believe. See generally *Modern status of rule as to validity of non-consensual search and seizure made without warrant after lawful arrest as affected by lapse of time between, or difference in places of, arrest and search*, 19 ALR3d 727, § 9 [search of automobile where arrest occurred near, but not in, automobile held valid], pp 746-749.

Here, the police had ample reason to conclude that defendant was a dangerous individual and to approach defendant warily. Prior to the arrest, the police conducted a law enforcement information network (LEIN) check on defendant, revealing that he had been charged six times

with weapons offenses, though never convicted; that he had been charged six times with kidnapping and convicted twice; that he had been charged seven times with sexual assaults and convicted twice; that he had been charged three times with assault; and that he had been charged twice with larceny. Later, at defendant's sentencing, the court determined that defendant had eight felony convictions. The police officers' caution was both warranted and rewarded: defendant was, in fact, armed as they feared, and the circumspect procedures of the police negated any possibility that defendant would use his weapon.

Further, the search conducted was not so removed in time or space that one can immediately determine that it was "unreasonable," the pertinent constitutional standard. US Const, Amend IV. The majority does not contest that defendant's arrest and his act of walking from the van occurred contemporaneously. With respect to defendant's location, at the preliminary examination, Chief of Police Mark Kik testified that defendant was "probably 10, 12 feet from the van" when he was arrested. At the suppression hearing, Kik averred that defendant was not more than twenty to twenty-five feet from the van when he was arrested. Finally, and most significantly, the unrefuted evidence demonstrates that defendant left the driver's side door to the van open, and left a loaded pistol in the door pocket of the van door.

Given defendant's proximity in time and location to the open van door containing his firearm, I agree with the trial court's statement that "[i]t was a lawful arrest and there was a lawful search." As recognized in both *Belton* and *Chimel*, searches incident to an arrest frequently occur after a defendant has been removed to the back seat of a patrol car and handcuffed. In other words, lawful searches occur far more removed in time and space than the search conducted in the present case, and in situations where there is virtually no possibility that the defendant will be able to obtain a hidden weapon. If these searches are deemed "reasonable," US Const, Amend IV, surely the search conducted in the present case is eminently *more* reasonable. Common sense would require police officers to remove a loaded pistol from an open van door.

The trial court found, in light of defendant's criminal history and the proximity of van, that the conduct of the officers was "simply prudent police work." The majority does not challenge this finding. I agree with it.

I would affirm.

/s/ Peter D. O'Connell

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF BARRY

THE PEOPLE OF THE
STATE OF MICHIGAN,

v File No. 94-053-FH

VAL RICCARDO FERNENGEL,

Defendant.
_____/

MOTION TO SUPPRESS EVIDENCE
BEFORE THE HONORABLE RICHARD M. SHUSTER,
CIRCUIT JUDGE
Hastings, Michigan – Thursday, June 23, 1994

APPEARANCES:

For the People: MR. DAVID E. GILBERT (P41934)
Chief Assistant Prosecutor
220 West Court Street
Hastings, MI 49058-1824
(616) 948-4850

For the Defendant: MR. BRADLEY R. JOHNSON (P44099)
44 East 8th Street, Suite 313
Holland, MI 49423
(616) 395-3789

RECORDED BY: Judy L. Jones, CER 0600
Certified Electronic Reporter

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WITNESSES:

None

EXHIBITS:

None

[2]

Hastings, Michigan
Thursday, June 23, 1994 – 4:24 p.m.

THE COURT: All right. We have the matter of the People of the State of Michigan versus Val Riccardo Fernengel, file 94-53-FH.

Representing the People of the State of Michigan is David Gilbert. Representing Mr. Fernengel is Bradley Johnson. And Mr. Fernengel is now joining us here in the courtroom.

And motion is to suppress evidence -- order suppressing evidence-- ". . . moves [the] Court for an order suppressing evidence seized by the Barry Township Police Department . . . ."

"Mr. Fernengel is charged in this case with carrying a concealed weapon . . . possessing a firearm when ineligible to do so because he had been convicted of a prior felony . . . ."

> Investigation -- I'm reading now from the petition – "[Investigation] in this case grows out of a search incident to arrest whereby Barry Township Police Officer Mark Kik and [Prairie] Township Officer Randy Yates found a pistol located in the pocket of the driver's side door of a van that the Defendant had recently driven."
>
> "The search incident to arrest was done [3] unlawfully and the evidence seized as a

result of it must be suppressed for the reasons that:

> . . . on February [1], 1994, Defendant was arrested in the Barry Township Police Department parking lot on a valid felony arrest warrant out of Crawford . . . Illinois."
>
> (2) "Prior to the arrest Defendant was allowed to walk away from his van approximately 20 to 30 feet before being informed he was under arrest."
>
> (3) "Immediately thereafter a standing wall search was conducted, Defendant was handcuffed, and he was taken into the Barry Township Police Department.
>
> D. Chief Mark Kik and Officer Randy Yates then conducted a search of the van incident to this lawful arrest. A chrome .25 ACP pistol was found in the pocket of the driver's side door.

4. Defendant recognizes that a police officer making a lawful custodial arrest of an occupant of a vehicle may as an incident to the arrest, search the automobile's passenger compartment and open any closed containers found therein." And they have the citations.

"5. However, the facts of this case are [4] distinguishable from the above-cited cases in that the van driven by Defendant had no connection with any stop of the vehicle because of some traffic violation, nor did the arrest of Defendant have any connection with any driving of said van. Defendant was arrested because of a valid felony arrest out of Illinois."

"That the police knew Defendant would be driving said van and the police knew . . . they would be arresting Defendant in the parking lot –" knew they would be in the parking lot "– of . . . Barry Township Police Department."

". . . this search does not fit one of the few carefully established well-delineated exceptions to the search warrant requirement and a search warrant should have been obtained."

Okay. I've gotten the message there. Did you want any additional remarks, Mr. Johnson, before we got started on this?

MR. JOHNSON: I have no opening, no, your Honor.

THE COURT: All right. Mr. Gilbert?

MR. GILBERT: Yes, your Honor. There is one case I left in my office that I had shown Mr. Johnson having to do with arrests of occupants of motor vehicles. And this case is no different than any other case. Doesn't have to [5] be based upon a traffic stop. The reason -- the resulting search is because of a lawful arrest of an occupant of a motor vehicle. In this case the -- the Defendant stepped from an automobile and was arrested. That gave the officers the right, pursuant to a lawful arrest, to search the passenger compartment of the motor vehicle that the Defendant had just left. Also in this case the officers had reason to believe that the Defendant would be armed.

THE COURT: Did -- were you going to do any -- take any -- was there any testimony or are you agreed upon the facts?

MR. GILBERT: We agree upon the facts. Basically more facts --

THE COURT: Then no testimony will be necessary?

MR. GILBERT: Well, there are more facts that are not in his brief. The facts that the officers relied on was a warrant that they validated out of -- out of another state, having to do with a bad check of some type with a 10,000-dollar bond and that the other state was willing to extradite. After going through -- running a LEIN on the Defendant, it came back that the Defendant had been charged six times for kidnapping, convicted twice; had been charged three

times with assaults, with no convictions; two counts of larceny, with no convictions; six counts of weapon offenses, with no convictions; and seven counts of sexual assaults, with two convictions. [6] Based upon that, they felt that this Defendant would be dangerous.

THE COURT: Did they have that in their possession at the time of the search?

MR. GILBERT: Yes, your Honor.

THE COURT: Okay.

Now, are -- again, are we agreed upon the facts, that we need no testimony, it'll be strictly argument and the -- and the Court applying law?

MR. JOHNSON: Your Honor. I -- I would like to take some testimony. I think there are some -- some more important facts to be brought out.

THE COURT: All right. All right.

MR. GILBERT: Okay.

THE COURT: Okay. Who do you want to have testify?

MR. JOHNSON: I -- I would call Officer Mark Kik to the stand.

THE COURT: All right. Fine.

If you'll come forward, please sir. Raise your right hand.

Do you solemnly swear or affirm the testimony you're about to give in this matter will be the truth, the whole truth, and nothing but the truth, so help you God?

CHIEF KIK: Yes, sir.

THE COURT: Put yourself right up there, if you will [7] sir, and pull the microphone up to your mouth.

All right, Mr. Johnson.

MR. JOHNSON: Thank you, your Honor.

MARSHAL KIK

called by the Defendant at 4:30 p.m., sworn by the Court, testified:

DIRECT EXAMINATION

BY MR. JOHNSON:

Q Officer Kik, could you tell the Court your full name and spell your last name for the record, please.

A First name, Marshal, M-a-r-s-h-a-l. Last name's Kik, K-i-k.

Q Do you go by officer?

A I'm the chief of police there --

Q Okay.

A -- yes, sir.

Q Chief, apparently an individual by the name of Val Riccardo Fernengel came to your attention. Could you explain to the Court how he did come to your attention?

A Yes, sir. I had received a complaint from a family of some what they thought were sexual allegations against Mr. Fernengel when their daughter was interviewed for a job at the business that Mr. Fernengel was running. And during -- I took the initial information from them. They did not know his full name. They knew that he was the owner of the business, and his name was Rick. So at that [8] time that's how I started into the investigation of Mr. Fernengel.

Q Did -- did it become apparent to you that -- that he owned a business in Barry County?

A At the time what -- in fact, that same day we were updating our -- what's a local business directory for our 911. I stopped by the -- what's called the Dairy Isle, 215 South Grove Street -- that's the business that Mr. Fernengel had -- was running, updated my business directory, obtained his full name at the time. He identified himself as the owner of the business. Also at that same time I had noticed a van parked in the parking lot of the Dairy Isle with some Illinois license plates on it. I had witnessed Mr. Fernengel driving that vehicle earlier. And when --

Q Okay. Let me just stop you there. How -- what was he doing when he was driving the van? Do you --

A That day I just happened to notice him pulling into the parking lot when I saw him. That was earlier in the day, prob'ly coming to work I take it.

Q Okay. And then there became a time that you became aware that he had a -- a valid felony warrant out of Illinois for his arrest?

A Yes, sir. While into this other complaint, I run the [9] license plate. And the license plate come back to a Val Riccardo Fernengel. And at that time a LEIN hit came across on the name from Illinois.

Q Okay. So the van was, as far as you were concerned, lawfully registered with the State of Illinois?

A Yes, sir.

Q Okay. Were there any other arrest warrants out for -- for -- say, for example, driving while license suspended, anything like that out of Illinois?

A No, sir. The --

Q It was -- it was for the felony. And what -- what kind of charge was that?

A Well, it was -- it -- what we would consider a bad check complaint. Their exact wording is a deceptive practice complaint with a bond of $10,000 out of Crawford --

Q Now -- now, once you found that out, what did you do in terms of arresting Mr. Fernengel?

A Well, we requested a confirmation of the warrant through Crawford County, Illinois. That was done by the LEIN system through our central dispatch. I also made a telephone call. After receiving verification, they -- they -- there was an extradition clause on the LEIN sheet when it came back. I called and talked to Sheriff I believe it's Weger in Crawford County, Illinois. At that time he verified the warrants were valid and wondered if I was [10] familiar with the subject and that he had been arrested before and then notified me of his criminal history.

Q So you got this criminal history then?

A We had -- from Sheriff Weger I got it orally. And then when the file check was done and I picked up the LEIN work, it did show the previous total when -- Illinois' Lein is different from ours. When their LEIN came back, it showed the charges out of Illinois.

Q Okay. So after you became aware that there was a valid felony warrant out for his arrest, you also gained information which would indicate to you that you might be dealing with someone who -- who has a violent past?

A Yes, sir.

Q That's be a fair statement?

A Yes, sir.

Q Okay. So -- so in arresting Mr. Fernengel, how did the police department go about that?

A Well, at that time –we're just a part-time police department. I was working alone. I was not going to initiate the arrest by myself. My nighttime officer was coming on duty. I waited for him to come on duty. At that time the Prairieville Township Police Department, Officer Yates, was working. I had requested assistance from him. And then a Deputy Olejniczak from the sheriff's department came down also. And at that time [11] we made arrangements to set up the arrest.

Q In fact, did you not actually call Mr. Fernengel's business and -- and request some food orders so that he would --

A Yes.

Q -- deliver that.

A Yes, sir, we did.

Q And where was he supposed to deliver that to?

A We gave him the address of 21 East Orchard, which is our -- our public safety building at the township.

Q So that's -- that's a police department?

A It's police, fire and ambulance, and township hall, yes, sir.

Q Are there cells in that, holding cells?

A No, sir. I -- I have a one-room office.

Q Okay. So at some point Mr. Fernengel shows up at the police department. Correct?

A Yes, sir.

Q What happens? Why don't you just explain what happens once he showed up?

A Officer Yates was in his private vehicle across the street from the business. We notified him by radio that the phone call had been made, the order had been placed. He notified us that a gentleman matching Mr. Fernengel's description got into the van, a black 1990 Ford van, and [12] was driving towards our location. We're, if you go by city blocks, approximately two city blocks away from the business. A short time later the van pulled into our driveway.

Q One he arrived there, did he get out of the van?

A Yes, sir. He exited the vehicle.

Q Did he have anything in his arms?

A He had the -- the food delivery.

Q The food. Okay. How far away from the -- at some point did -- did a police officer say to him that he was under arrest?

A Yes, sir. We let him exit the vehicle and walk away from the vehicle so -- in our opinion so he wouldn't have a chance to get back into the vehicle. He prob'ly walked prob'ly 20, 25 feet at the most, and then he was approached by officer Olejniczak and Officer Fawcett from my department and told he was placed under arrest.

Q A standing wall search was done?

A Yes, sir.

Q He was handcuffed?

A Yes, sir.

Q Where was he taken immediately after he was handcuffed?

A Just inside our office door.

Q Okay. At some time you and -- and Officer I believe it's Yates -- [13]

A Yes, sir.

Q -- conducted a search on the van?

A Immediately. In fact, while they started handcuffin' him, we secured the vehicle, yes, sir.

Q Okay. And I believe according to your police report that search was done incident to the -- to the arrest you were making on Mr. Fernengel, based on the felony warrant out of Illinois?

A Yes, sir.

Q Okay. How much time between the time you found out about this felony warrant out of Illinois, how much time occurred between that point and the time you had set up this purchase of food from Mr. Fernengel?

A If you give me a second here I can have a LEIN time slip here. It should say. There should be a time. One of the LEIN slips shows approximately 4:30 the information was obtained from Illinois as far as a warrant confirmation.

Q Okay. And then when did you effectuate the arrest?

A At 8:10 p.m.

Q So that was the same day. If was just a matter of hours?

A Yes, sir.

Q Okay. Now, on the way over, did anyone observe any moving violations on behalf of Mr. Fernengel? Was he speeding, anything like that?

A No, sir. [14]

Q Okay. And as far as you know he had a valid license to drive?

A He had a valid Illinois license, yes, sir.

Q Did you fully expect to find something in the van in terms of a weapon, anything like that, given his past history, when you -- when you conducted the search?

A Well, at the time we knew he had a -- the -- the history showed on the computer, and I guess with every traffic stop you expect the unexpected.

MR. JOHNSON: That's all I have, your Honor. Thank you.

THE COURT: All right. Thank you, Mr. Johnson. Mr. Gilbert?

MR. GILBERT: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. GILBERT:

Q What did Sheriff Weger tell you about the Defendant?

A He had been arrested previously, I take it in Crawford County, Illinois. The parole office and that are within a very short distance of each other. So he was familiar with Mr. Fernengel and that of his past history as far as he was out on parole for a kidnapping/sexual assault type offense.

Q And what was the basis of the information that you were investigating as far as the complaint that originally brought you into contact with him? [15]

A Some sexual allegations against a 16-year-old female.

Q Why didn't you arrest him at his store?

A With a track hickory (sic) showing on the LEIN slip of some weapons charges and assaultive charges, not knowing if he had any employees in the store at the time, also if any customers would've showed up, just for other people's safety and our own safety, we woulda liked to controlled the arrest situation.

MR. GILBERT: Okay. Thank you. I have nothing further, your Honor.

THE COURT: All right. Thank you. Anything further, Mr. Johnson?

MR. JOHNSON: No, your Honor.

THE COURT: All right. You may step down, sir.

THE WITNESS: Thank you, sir.

(At 4:40 p.m. witness excused)

THE COURT: Anything further that you desire, Mr. Johnson?

MR. JOHNSON: I have no further proofs, your Honor, no.

THE COURT: All right. You wish to make comments?

MR. JOHNSON: Yes. Thank you, your Honor.

As the-- the motion indicates, your Honor, the law in [16] Michigan, as well -- as well as in the United States, or as the United States Supreme Court has set forth, is that a police officer making a lawful custodial arrest of an occupant of a vehicle may, as an incident to that arrest, search the automobile's passenger compartment and any opened -- any opened or closed containers found therein.

I think in this matter we're certainly not arguing that there was a lawful arrest warrant out of Illinois. I think obviously the -- the officer had -- had cause to arrest

him. And we believe that -- those circumstances to be lawful. We're not arguing that.

We are arguing, however, that this case is somewhat distinguishable from -- from the cases that have been cited in that Mr. Fernengel -- and let me just back up -- most of the -- or all of the cases that are cited there, all of the fact patterns, seem to fit this pattern, and that is that originally the -- the contact between the police and -- and the defendant is because of some type of moving violation. It seems like the car is speeding or -- or the exhaust is loud, something along those lines. And the contact between the police and a defendant in these cases originates because of the driving of the vehicle.

Now, in t his case essentially Mr. Fernengel was set up by the police. And let me add -- let me commend the police officer in this -- in this case. I think that was a [17] great idea, given the -- the history that -- that the officer had come to know, whether or not it was true or untrue, about Mr. Fernengel. He did something I think was a smart thing because there -- there seemed to be some indication that there was some -- some violence in my client's past and that a weapon may have been used. So I think the idea of calling up and having Mr. Fernengel to -- to get away from the van was actually a good idea, considering the information that Officer Kik had.

However, as I stated before, the contact between the two did not originate from -- from driving a vehicle and there was no, as Mr. -- or Officer Kik indicated, that Mr. Fernengel did not violate any speed ordinances, anything like that. He simply drove into a parking lot, I believe was parked legally in the parking lot, and was going to deliver food. He got out of the truck -- out of the van approximately 20 to 25 feet, and the reason for that was because they didn't want him to get back in the van and -- and possibly grab some type of weapon.

However, as I stated, the -- the connection or the -- the police contact originated because of this valid felony warrant out of Illinois. It did not originate because of

some driving perpetrated -- some bad driving perpetrated by Mr. Fernengel. And the question I asked Officer Kik as [18] well about how much time between the-- the knowledge of the felony warrant and this-- this setup for delivery was approximately -- I believe it was like between four and eight o'clock, almost four hours.

I would suggest to the Court, given Mr. Fernengel's record and given the fact that there was a felony arrest warrant out -- out for his arrest out of Illinois, that -- that the officer could have gotten a search warrant for the van, especially because they set up this delivery type of deal. They knew he was gonna be delivering food to them and they knew he would be driving this van or ostensibly they -- they anticipated that he would be driving this van as Officer Kik testified that he saw him driving this van before. And -- and why we didn't get into whether or not there were other vehicles at this place of business, I think it was all of our understanding that -- that Mr. Fernengel was -- was driving this van exclusively for his business.

I think a -- a search warrant could've been obtained given the way this was all set up. Again, I think the case -- this case is distinguishable from those other cases factually in this -- in how this contact was made in terms of the driving and in terms of -- of -- of how this was all set up. And I think a search warrant should have been obtained in this matter. I think this is not the -- the [19] classic case of a search incident to arrest. And I would ask the Court to suppress the gun that was obtained as -- as a result of it.

Thank you.

THE COURT: All right. Thank you. Mr. Gilbert?

MR. GILBERT: Thank you, your Honor.

Your Honor, New York versus Belton stated that a -- a lawful arrest of an occupant of an automobile justifies the search of the passenger compartment, including the containers therein.

In this case it doesn't matter if it was a traffic violation or not. Any occupant of an automobile can be arrested if there's a warrant out for them. In this case the issue was not driving, the issue was an arrest warrant. The Defendant is arrested. The issue of the search is whether or not the arrest was valid, not whether or not someone was driving the automobile.

In this particular case we've shown that the Defendant had just gotten out of the motor vehicle, the motor vehicle had not been parked out in front of his store, and the Defendant was arrested within the store or the Defendant didn't walk from the store to the police department and then they searched his vehicle parked someplace else. This Defendant had just immediately come [20] from the van, which gave them the right to search that van.

One argument that could be made is, well, he was already in handcuffs. Well, your Honor, the normal practice of a police officer when they're arresting somebody who has been in the vehicle is to handcuff 'em, put them securely someplace away, like the backseat of a police car, then conduct their search of the automobile.

In this case the officers did not violate the search and seizure rules.

THE COURT: All right. Thank you.

We've reviewed the search and seizure cases. There are a number of them in Michigan. We've reviewed them. And of course they -- they cite federal cases, too, and we've reviewed that.

The Court finds that the conduct of Officer Kik was simply prudent police work. It was a lawful arrest, there was a lawful search. And anything less than what Officer Kik did in the way of prudent searching I would consider imprudent police conduct. Officer Kik's a young man. If he wants to make it to middle age, he better conduct himself with the same prudence in all

matters as he did in this matter.

Our search and seizure laws are of course to protect the rights of citizens, but at the same time they were not [21] meant to put a burden into police work that made it impossible to do it with some degree of safety. And obviously being able to make a search is -- is sensible and the courts have recognized that. And I see no violation of any -- any rights at all. I see no reason to suppress the evidence.

Of all kinds of evidence that you might look at suppressing, certainly finding a gun is perhaps the -- the most reasonable of all to not suppress inasmuch as you have further evidence that it was a worthwhile thing to have done. It's considered by this Court, anyway, that anyone who has a gun has an intention that if they deem it necessary they will use that gun. And, as I say, I would that all police officers conduct themselves with the care that I've seen in this case by Officer Kik. And, as I say, if they don't, we know of too many situations where they haven't and they're no longer with us.

Prudent police work. Nothing in the law that prevents prudent police work that I can see in this situation. The motion is denied. All right.

MR. JOHNSON: Thank you, your Honor.

MR. GILBERT: Thank you, your Honor.

THE COURT: Uh-huh., Thank you.

(At 4:49 p.m. proceedings concluded)[22]

STATE OF MICHIGAN)
)
COUNTY OF BARRY)

I certify that this transcript, consisting of 23 pages, is a complete, true, and correct transcript of the proceedings and testimony taken in this case on Thursday, June 23, 1994.

/s/
Judy L. Jones
CER 06000
Courthouse
2200 West State Street
Hastings, MI 490058 [23]

STATE OF MICHIGAN

IN THE 56-1 DISTRICT COURT
CITY OF HASTINGS (BARRY COUNTY)

THE PEOPLE OF THE
STATE OF MICHIGAN ,

v File No. 94FY-0065

VAL RICCARDO FERNENGEL,

Defendant.

PRELIMINARY EXAMINATION BEFORE THE
HONORABLE GARY R. HOLMAN, DISTRICT JUDGE
Hastings, Michigan - Wednesday, March 16, 1994

APPEARANCES:

For the People: MR. DALE CROWLEY (P26633)
Prosecuting Attorney
220 West Court Street, Suite 201
Hastings, Michigan 49058
(616) 948-4850

For the Defendant: MR. BRADLEY JOHNSON (P44099)
44 East 8th Street, Suite 313
Holland, Michigan 49423
(616) 395-3789

RECORDED BY: Kathy Shay, CER 4476
Certified Electronic Recorder
(616) 948-4835

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[2]

Hastings, Michigan
Wednesday, March 16, 1994 - 3:35 p.m.

THE COURT: This is in the matter of the People versus Val Fernengel. Two files, 94FY-0065, felony scheduled for a preliminary examination at this time. There is the accompanying misdemeanor file, 94SM-0066.

Mr. Johnson appears on behalf of the accused who is present; Mr. Crowley appears from the Prosecutor's Office.

People ready to proceed?

MR. CROWLEY: Yes, your Honor, we are.

THE COURT: Defense ready?

MR. JOHNSON: Yes, your Honor.

THE COURT: Mr. Crowley?

MR. CROWLEY: People would call Mark Kik.

THE COURT: Please raise your right hand. Solemnly swear or affirm the statement you're about to make in this case will be the truth, whole truth, nothing but the truth?

MARK KIK: Yes, sir.

THE COURT: Please be seated.

MARK KIK

called by the People at 3:36 p.m. and sworn by the Court, testified:

DIRECT EXAMINATION

BY MR. CROWLEY:

Q Please state your name and spell your last name for us.
[3]
A Mark Kik. K-I-K.

Q Where are you employed, sir?

A Barry Township Police Department.

Q In what capacity?

A I'm the Chief of Police.

Q And is Barry Township located in Barry County?

A Yes, sir.

Q Chief Kik, did you have occasion in your capacity as Chief of Police in Barry Township to come in contact with the Defendant in this case, Mr. Fernengel?

A Yes, sir, I did.

Q And was that on or about the 21st of February, 1994?

A Yes, sir, it was.

Q What was your first contact with Mr. Fernengel that day?

A That day was a --- I had made a business contact with him originally to update our business directory. He was a new business owner in town. I had updated the business file. Not long after that I had made --- a contact was made in regards to a possible complaint at his business location.

Q Was that all on the 21st?

A Yes, it was.

Q In your contact with him — your first contact with him on that day, the 21st, where did you meet him?

A At his business.

Q And that was what?

[4]

A It's called the Dairy Isle on M-43 in Delton.

Q Did -- Did Mr. Fernengel identify himself to you?

A When I asked -- I needed a name for my business directory. He identified himself as Rick Fernengel or however he pronounces his last name. Yes, sir.

Q And did you run any -- do any further investigation to identify Mr. Fernengel?

A Yes, sir, I did. I run the license plate number of his van that was parked at the business and that come back registered to him, but registered to a Val R. Fernengel out of Illinois.

Q Did you do any further investigation regarding that name you had received?

A Yes, sir. In a subsequent check through NCIC LEIN revealed a warrant out of Crawford County Sheriff's Department, Illinois.

Q Did you personally attempt to verify the validity of the warrant you ob--were notified through LEIN system on?

A Yes. We did it both ways. I talked to the sheriff personally in Crawford County by telephone. He also faxed me verification, and a LEIN verification was made through our Barry County Central Dispatch.

Q As to the validity of the warrant?

A Validity of the warrant. Yes, sir.

Q What was the warrant for?

[5]

A It was a --- I believe their terminology -- Ours would be a bad check complaint. Their's, I believe, is deceptive practice, a felony warrant.

Q Now, on that day you received verbal confirmation of the warrant?

A And paper work via the LEIN system. Yes, sir.

Q Via the LEIN system. Had you subsequently received a -- essentially a hard copy of the warrant?

A Yes, sir, I did.

Q And how -- how long afterwards did you receive a hard copy?

A Hard copy was received the same day of the incident, I believe.

(At 3:30 p.m., PX#1 marked for identification)

Q Can you identify for us proposed Exhibit Number 1?

A Okay. That is a copy of the warrant from Crawford County, Illinois.

Q Does that correspond with the information you received via LEIN and via telephone on the 21st of February?

A Yes, sir.

MR. CROWLEY: Your Honor, we'd offer proposed Exhibit Number 1.

MR. JOHNSON: No objection.

THE COURT: Exhibit 1 is admitted.

(At 3:400 p.m., PX#1 received into evidence)

BY MR. CROWLEY:
[6]
Q Chief Kik, after receiving confirmation on the warrant, did you take any action to effectuate an arrest?

A Yes, sir. Previous to that we did a criminal history check on the subject. I like to do a background before I make an arrest. That background revealed a -- what appeared to be an assaultive type nature on the criminal history check. I again recontacted Illinois, talked with them. They told me that the gentleman had been arrested for -- previously arrested for some weapons offenses and some crimes against people offenses, so at that time we requested assistance from the sheriff's department and the Prairieville Police to set up an arrest procedure.

Q And what was done to set up the arrest?

A Mr. Fernengel's business advertised that they would deliver food, so one of my officers made a telephone call to the business placing an order and having it delivered to our ambulance service in Delton.

Q Then what happened?

A At that time Mr. -- hope I'm not mispronouncing --- Fernengel delivered the food. At that time he was approached by the officers and placed into custody for the warrant out of Illinois.

Q Were other officers present assisting you in doing that?

A Yes. There was Officer Fawcett from my department, Officer Olejneczak from the sheriff's department, and Officer Yates [7] from the Prairieville Township Police Department, and myself.

Q And physically did somebody approach Mr. Fernengel and place him under arrest?

A Yes, sir. Mr. --- or Deputy Olejneczak and Officer Fawcett did.

Q And what were you doing at that time?

A I was a cover officer. I was located on the west side of the building.

Q And then what happened after that?

A Those two officers took Mr. Fernengel into physical custody, escorted him into our office. At that time --

Q Where was – Where was Mr. Fernengel when he was physically approached by the officers?

A In the parking lot of our --- our office on the south end of our building.

Q Where was the – Where was the van at?

A Parked directly in front of our office doors which is in our parking lot on the south side of our building.

Q And what happened then when the officers approached and were taking custody of Mr. Fernengel?

A Okay. When he exited the vehicle he had his food in a box. He left his van door open. As he cleared the van he was challenged by the officers to stop and raise his hands and that he would be placed under arrest.

[8]

Q And that was in close proximity to the van?

A That's -- Yes, sir, it was. As soon as he cleared the

doorway to get out of the --

Q A matter of feet?

A Yes, sir. Probably 10, 12 feet from the van.

Q Was there any search for weapons incident to the arrest of Mr. Fernengel?

A Yes, sir. His physical was searched -- his person was searched by the officers. At that time Officer Yates and myself approached the vehicle doing a wingspan search of the front seat of the vehicle. A small caliber handgun was found in the door pocket of the van.

Q And that was from the van that Mr. Fernengel had just exited?

A Yes, sir, that's registered to him.

(At #;43 p.m., PX#2 marked for identification)

Q Can you identify for us proposed Exhibit 2?

A Yes, sir. That's a photo that I took of a -- it's a FIE Corporation .25 automatic that we took out of the van.

Q Twenty-five caliber pistol?

A Yes, sir.

Q Was it loaded?

A There was six rounds in the magazine, nothing was in the chamber, but the gun was loaded. Yes, sir.

MR. CROWLEY: Move the admission of Exhibit Number 2.

[9]

MR. JOHNSON: No objection, your Honor.

THE COURT: Exhibit 2 is admitted.

(At 3:44 p.m., PX#2 received into evidence)

MR. CROWLEY: Your Honor, I have no further questions at this time of Officer -- or Chief Kik.

THE COURT: Mr. Johnson?

MR. JOHNSON: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. JOHNSON:

Q Chief Kik, you stated that my client was 10 to 12 feet away from the van when he was arrested?

A Yes. We let him get away from the vehicle so we had a clear vision of him away from the vehicle.

Q Okay. And what happened? Someone yelled --

A An officer --

Q -- freeze?

A -- stepped out of the door, identified ourselves as police officers and told him not to move and place his hands up.

Q And he cooperated with you?

A Yes, sir.

Q Eventually, you stated that someone searched his person. Who -- Who -- Who was that?

A Deputy Olejneczak and Officer Fawcett were the search officers.

Q When you did this -- or when they did this, was he up against [10] a wall?

A I believe he was. Yes, sir.

Q And how far away from that wall from the van was -- would you approximate?

A He was placed against the wall for our safety and his. He would have been moved probably another couple of feet up to the wall.

Q Was anything found on his person?

A No weapons or nothing like that, sir.

Q So when you searched this van it was incident to an arrest, correct?

A Yes, sir.

Q It was not an inventory search.

A No, sir.

Q Now, before you searched the van did you have any reason to suspect that any contraband or any criminal evidence would be found in the van?

A With his history of the weapons and offenses we just did a wingspan search of the vehicle. There was no -- no knowledge if he would have one with him or not. No, sir.

Q Did you have any knowledge if anyone else drove the van, at all?

A To our office, he drove the van.

Q Did you have any knowledge that his wife or any of his employees may have driven this van?

[11]

A I had never witnessed them driving it. No sir.

Q Did you have any – anybody tell you that?

A No, sir.

Q So when you drove into this parking lot, it was your intention to arrest him once he cleared the van, so to speak.

A Yes, sir.

Q A total of four officers conducted this, correct?

A Yes, sir.

Q Have you ran -- Is there any way to trace this gun? Where it may have been purchased from or anything like that?

A It's been file checked through the LEIN NCIC system and it comes back no record on computer. We have not done any manufacturer's search on it.

Q Did Mr. -- Did my client ever state to you that it was his gun? Did he say anything in reference to that?

A He didn't speak with me. I believe he did not to the officers either.

Q When you conducted your search, was -- at that point in time was he placed in handcuffs?

A Yes, sir, he was.

Q And there were two officers with him at that point as well.

A Yes, sir, there was.

Q And approximately he was 15, 20 feet away from the van.

A Yes, if not further. We had moved him away from the van to [12] do our search. Yes, sir.

MR. JOHNSON: That's all I have your Honor. Thank you.

THE COURT: Any redirect, Mr. Crowley?

MR. CROWLEY: Just a couple questions.

REDIRECT EXAMINATION

BY MR. CROWLEY:

Q Chief Kik, did you show the gun, the pistol, to anyone after it was recovered from the van?

A Later that evening his wife, Charlotte I believe --

MR. JOHNSON: I would object to anything Charlotte may have said, your Honor, as being hearsay.

MR. CROWLEY: There may be an exception which would apply, your Honor. I could pursue further with foundation.

THE COURT: You may continue at this point. The answer to that question is not hearsay, but as Mr. Johnson suspects, it may come up, so --

MR. CROWLEY: It may come up. Yes.

THE COURT: Okay.

MR. CROWLEY: I -- I -- I'm heading that way, your Honor, I confess to that, but there may be an exception that would apply.

THE COURT: You may continue at the present time.

BY MR. CROWLEY:

Q You met who was identified to you as the wife of Mr. [13] Fernengel?

A That's affirmative, and her name was Charlotte. She came up to take possession of the van. At that time she had asked us what her husband --

Q Just a second as far as what she asked you.

How long after the arrest had occurred did you see this person called Charlotte?

A We turned the van over to her at 8:55 p.m.

Q How long after the arrest would that be?

A The arrest was made at approximately 8:10 p.m.

Q So a matter of --

A It's about 45 minutes.

Q -- 45 minutes?

A Yes, sir.

Q Did she identify herself to you in any manner?

A She identified as his wife and then we asked for an I.D. of her --

Q And that I.D. indicated Charlotte Fernengel?

A Yes, sir, it did.

Q Now, during your meeting -- how long did it last with Charlotte?

A Approximately ten minutes at the most.

Q And did you at some point show her something?

A Yes, sir. She was wondering why her husband was under arrest. At that time it's explained the warrants out of [14] Illinois and that he was going to be charged in our jurisdiction with carrying a concealed weapon, and at that point in time we had placed the weapon in a clear evidence bag and showed her the weapon.

Q Did you ask her anything about the weapon?

A She had said that she --

Q First question is did you ask her anything about the weapon?

A As far as the specifics, I don't believe I did. No, sir.

Q And where -- The weapon was in a clear plastic bag?

A When I showed it to her, yes, in one of our evidence bags that we placed it in after I found it.

Q And where was that at?

A It was -- I had brought it out of our evidence locker. She wondered what the concealed weapon was that her husband was being charged with, and showed her the firearm. And that was in my office.

Q It was in your office --

A Yes.

Q She's in the office with you.

A Yes.

Q And you bring out the gun in a clear plastic bag.

A Yes.

Q And then what happened?

A She said something about --

MR. JOHNSON: I would object to anything Mrs. Fernengel [15] is to have said, your Honor, as being hearsay.

THE COURT: Mr. Crowley?

MR. CROWLEY: One -- One -- One more --- If I may ask one more question, your Honor, then I can respond?

THE COURT: Okay. One more question.

Don't answer the question until -- I don't know what it's going to be, but don't answer it 'til we get it -- the legal part straightened out.

THE WITNESS: Okay.

THE COURT: Go ahead, Mr. Crowley.

BY MR. CROWLEY:

Q Okay. When Charlotte Fernengel made a comment, had you asked her a question at that point?

A I don't believe so. No sir.

Q Did it appear to you that what elicited a statement from her was production and observation of the gun in the bla-- plastic bag?

A Yes, sir.

MR. CROWLEY: Your Honor, we would request that Chief Kik be permitted to testify to the statement made by Charlotte Fernengel as being an utterance of present -- present sense impression. It's a spontaneous -- apparently from what Chief Kik here says -- a spontaneous utterance that was made at that time.

THE COURT: Any response, Mr. Johnson?

[16]

MR. JOHNSON: I'll just continue the objection, your Honor.

THE COURT: I don't know what the statement was. I'm going to make a presumption for the purpose of ruling --

MR. CROWLEY: Would you like an offer of proof on the statement, your Honor?

THE COURT: What was the statement? Yeah.

MR. CROWLEY: The statement was to the effect about the gun having been purchased at a flea market.

THE COURT: I'll overrule the objection under Rule of Evidence 803.1 present sense impression. It's a statement describing or explaining an event or condition made while the declarant was perceiving that event or condition.

MR. CROWLEY: Thank you very much, your Honor.

BY MR. CROWLEY:

Q Can you tell us then, Chief Kik, what was said at that point?

A When I showed her the firearm, she had stated that they had purchased the firearm – or the firearm, I should say, had been purchased at a flea market, and then she proceeded to say that it had not been located in the vehicle, or she did not know it was located in the vehicle. She wasn't aware of it.

Q Now, one final question here, Chief Kik. Is -- Is the individual, Mr. Fernengel, that you arrested in the [17] courtroom today?

A Yes, sir, he is.

Q Could you tell me where he's at?

A He's located next to Mr. Johnson in the green coveralls.

Q Did you from your investigation determine his full name?

A Yes, sir, I did.

Q What was that?

A It would be Val Riccardo Fernengel.

Q Did you have contact with Mis - or with any authorities in Illinois regarding the prior criminal history of Mr.

Fernengel?

A Yes, sir, I did. His parole officer in Illinois.

MR. CROWLEY: Have nothing further, your Honor.

THE COURT: Mr. Johnson?

MR. JOHNSON: No further questions, your Honor.

THE COURT: You may step down.

THE WITNESS: Thank you, your Honor.

(At 3:54 p.m., witness was excused)

MR. CROWLEY: Your Honor, in view of the testimony being elicited by Chief Kik, we had intended on calling –

(Mr. Crowley has discussion with Chief Kik and Mr. Johnson)

(At 3:55 p.m., PX#3 and PX#4 marked for identification)

Your Honor, for the record I've had marked proposed Exhibit 3, which is a copy of the letter I wrote to [18] corrections – Vienna Corrections Center in Illinois requesting records regarding Val Riccardo Fernengel, and then attached is – are certified records they sent regarding that request. Proposed Exhibit 4 are certified records received from 18th Judicial Circuit Court, Page County, State of Illinois, also regarding Val Fernengel, which correspond with the records received from Vienna Corrections Center.

I previously provided a copy of these records to Mr. Johnson. Would ask that they be admitted at this time.

MR. JOHNSON: No objection, your Honor.

THE COURT: Exhibits 3, 4 admitted at this time.

(At 3:56 p.m., PX#3 and PX#4 received into evidence)

MR. CROWLEY: I have no further proofs, your Honor.

THE COURT: Mr. Johnson?

MR. JOHNSON: No proofs, your Honor.

THE COURT: Proofs are closed.

Mr. Crowley?

MR. CROWLEY: People move to bind over to Circuit Court on Count 1, carrying a concealed weapon, and Count 2, possession of a firearm by person who had been convicted of an offense punishable by four years or more.

THE COURT: Mr. Johnson?

MR. JOHNSON: Thank you, your Honor. Essentially, if this Court is to rule that the search incident to a lawful [19] arrest was done constitutionally, obviously my client will be bound over.

We have a couple of problems with that search, however. We don't argue that they had good reason to search Mr. -- or good reason to arrest Mr. Fernengel. They certainly did. The information the police had certainly gave them -- those individuals authority to arrest my client.

However, what they do is they call Mr. Fernengel up to deliver some food. Once he clears the van is when this arrest of the person takes place. Some 15 to 20 feet away from the van he is placed up against a wall. His person is searched, nothing is found, and he is in -- he is in handcuffs at the time Chief Kik then goes and searches the van.

I would argue, your Honor, that the reason -- the justifications for a -- for a search incident to a lawful arrest are that -- are for the protection of the officer or the prevention of destruction of any type of criminal evidence. I don't see that in this case. This individual is well away from the van, he's in handcuffs. There's actually two officers who are surrounding him. Chief Kik, I don't believe, was in any type of danger from this individual. I believe this -- this is a

search that was conducted unlawfully or against the constitution. I do recognize that a police officer can make a search incident to a lawful custodial -- custodial arrest and search in [20] automobiles -- the driver's compartments or the passenger compartments. I understand that and we acknowledge that. However, this case differs from -- from the normal case, so to speak, in that Mr. Fernengel was well away from the car at the time of the arrest and he was in handcuffs, he was bound, he was no threat whatsoever.

For those reasons, we would ask the Court to make a determination that this was not a constitutional search in this case, and ask that the evidence be suppressed and that the case be dismissed. Thank you.

THE COURT: Mr. Crowley, do you wish to respond?

MR. CROWLEY: Yes, your Honor. I would submit to the Court that the testimony you have heard establishes that the search that was made here was incident to arrest.

The testimony shows Defendant had exited a motor vehicle, a van; that he was almost immediately thereafter placed under arrest. As I understand the law with regard to search and seizure, that a search may be made of a passenger compartment of a motor vehicle where the individual who has recently occupied that vehicle has been arrested, and I don't think it's determination -- a determination that needs to be made on a case-by-case basis as to the specific need in each individual case as long as it's made contemporaneously with the arrest and the individual has recently been in that particular motor vehicle. [21]

I can't cite the case or cases, but I am aware that there are cases in Michigan, for example, which uphold a search of the motor vehicle after an individual has been arrested and has been handcuffed and has been detained in back of a police squad car. Essentially the argument being made -- well, in that particular case the individual is -- cannot get access to weapons out of the motor vehicle, but those searches have been upheld. Again, based on the fact that the arrest has been -- been made from -- where the individual has been in the motor vehicle and the search is recently contemporaneous with that arrest.

So we would submit that the search is valid and that, these charges supported by valid evidence, Mr. Fernengel should be bound over to Circuit Court.

THE COURT: On that legal issue Constitution of the United States requires a warrant to search. There are recognized exceptions. There's no dispute that search incident to a lawful arrest is an exception to the search warrant requirement.

The question in this case is not whether there was a lawful arrest; that's acknowledged by Defense. Court determines that there was a lawful arrest. The question is, is whether or not the search that was conducted was incident to that lawful arrest.

The law a few years back, and I hate to indicate my [22] age, but it was probably a -- at least the time I was in law school. The search incident to arrest required the -- there to be a lawful arrest. There was in this case. It required the officer to search only within the so called leaping distance or within the area of control of the Defendant and again only for weapons or for evidence that might be destroyed.

There came a change in time. I can't tell you, it's probably seven, eight years ago, that the appellate court addressed a very similar issue that we're dealing with here today. The problem with the leaping distance theory was that officers would frequently leave suspects, defendants, in an area proximity that was in a location to which they could get to a weapon or get to evidence to destroy it in order to justify the search based upon the leaping distance theory. And the appellate court concluded that that's quite foolhardy to have a rule that encourages officers to endanger themselves to be able to effectuate the completeness of the search. And in an automobile case, as Mr. Crowley's indicated, there's case law that even a person that's in the back of a police cruiser does not prohibit the legitimacy of a search of a motor vehicle incident to an arrest when that person is arrested and placed in the rear of a vehicle.

The circumstances described in this case I believe fall [23] under that case law and under the exception of search incident to a lawful arrest. Court finds probable cause to believe that the offenses alleged in the counts did occur, and also that there's probable cause to believe that the Defendant did in fact commit those counts, and those are carrying a dangerous weapon, a pistol, within a motor vehicle, and also that he was ineligible because of previous conviction involving an offense punishable by more than four years in prison to have possession of such a weapon.

Court finding probable cause on each of the elements upon the totality of the circumstances and the evidence presented, Defendant is bound over to Circuit Court for further proceedings. [24]